45921-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

APRIL ADAMS,

Appellant

v.

AUSTIN McMILLIN,

Respondent

APPELLANT'S REPLY BRIEF

Barbara A. Henderson,
WSBA No. 16175
Morgan K. Edrington,
WSBA No. 46388
SMITH ALLING, P.S.
Attorneys for Appellant APRIL ADAMS

1515 Dock Street, Suite 3
Tacoma, Washington 98402
Telephone: (253) 627-1091
Facsimile: (253) 627-0123

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CASES

WASHINGTON

STATUTES

I. ARGUMENT IN REPLY

Ms. Adams assigned error to (1) the finding that the December 6, 2013 Order was violated, (2) that she had the ability to comply with the order, and (3) the conclusion that she was in contempt of the December 6, 2013 Order.

A. A Ruling from the Bench by the Trial Court is Insufficient to Constitute a Finding for Contempt.

To find contempt, the trial court must make a finding of intentional disobedience, bad faith, or intentional misconduct. Under the contempt statute relating specifically to noncompliance with parenting plans, "If, based on all the facts and circumstances, the court finds after hearing that the parent, *in bad faith*, has not complied with the order establishing residential provisions for the child, the court shall find the parent in contempt of court." RCW 26.09.160 (2)(b) (emphasis added). The express findings of bad faith or intentional misconduct are a predicate for contempt judgment. *In re James*, 79 Wn. App. 436, 440, 903 P.2d 470 (1995); *In re Humphreys*, 79 Wn. App. 596, 599, 903 P.2d 1012 (1995).

The bare finding in the January 15, 2014 Order, unsubstantiated with specific references to any conduct or any intentional misconduct, should be insufficient to satisfy the requirements of RCW 26.09.160(2)

under these circumstances. Statements made by the judge cannot constitute findings of contempt.

In effort to show the trial court complied with this predicate finding, Mr. McMillin points to Judge Martin's statements from the bench as support for an express finding of bad faith or intentional misconduct. Respondent's Brief at 6 (citing RP 27). These verbal rulings are insufficient in contempt to constitute the requisite findings of bad faith.

> A court's oral opinion is not a finding of fact. *State v.* Reynolds, 80 Wn. App. 851, 860, n.7, 912 P.2d 494 (1996) (citing *State v. Williamson*, 72 Wn. App. 619, 623, 866 P.2d 41 (1994)). Rather, the court's oral opinion is 'no more than a verbal expression of [its] informal opinion at the time...necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned.' *Ferree v. Doric Co.*, 62 Wn.2d 561, 567, 383 P.2d 900 (1963). And the trial court's oral decision is not binding "unless it is formally incorporated into findings of fact, conclusions of law, and judgment." *State v. Dailey*, 93 Wn.2d 454, 459, 610 P.2d 357 (1980).

State v. Hescock, 98 Wn. App. 600, 605-06, 989 P.2d 1251 (1999). When the written findings and conclusions are ambiguous, then the reviewing court may look to the trial court's oral ruling. *Id.* Here, the written Order of Contempt is unambiguous.

Mr. McMillin argues, "Judge Martin was not required to state the magic words 'bad faith' on the court record," but this ignores the well-established precedence that not only must the trial court expressly find bad

faith, but that finding must be contained in the contempt order. The rights of contemnors and RCW 26.09.160(2)(b) support the requirement that the trial court makes *specific* finding of bad faith or *intentional misconduct* as a predicate for a contempt judgment. *In re Marriage of Davisson*, 131 Wn. App. 220, 224, 126 P.3d 76 (2006). Nothing in the court's oral ruling can be used to interpret the order of contempt in this case. Moreover, Ms. Adams did comply with the December 6, 2013 ruling, and as such, cannot be found to have acted in bad faith. The finding in the contempt order of bad faith is a conclusion without any additional findings in support. Ms. Adams did not intentionally engage in misconduct sufficient to justify bad faith, the order does not specifically identify the conduct constituting bad faith, and the oral record cannot supplement the Order; as such, this finding should be reversed.

B. Ms. Adams Did Comply with the Residential Schedule.

Ms. Adams' conduct at issue does not constitute intentional misconduct or bad faith. To support a finding of contempt, the alleged violated order must be strictly construed. *In re Marriage of Humphreys*, 79 Wn. App. 596, 599, 903 P.2d 1012 (1995). "[T]he facts must construe a plain violation of the order. *Id.* (citing *Johnston v. Beneficial Management Corp. of Am.*, 96 Wn.2d 708, 713-14, 638 P.2d 1201 (1982). Strictly construing the December 6, 2013 Order, Ms. Adams did comply:

she was at the University Place transfer location to return the child to Mr. McMillin at 5:00 p.m. on Saturday, December 7, 2013. No one was there to receive the child.

Several hours later, Ms. Adams learned that Mr. McMillin was out of the state and he had designated a neighbor to pick up the child. Ms. Adams did not know his neighbor, and Mr. McMillin would not confirm when he was going to return from Las Vegas. Even if Ms. Adams' conduct could be considered non-compliance, she presented a reasonable excuse for her conduct: Mr. McMillin was not even in the state and was not available to receive their child. *See In re Marriage of Rideout*, 150 Wn.2d 337, 352-53, 77 P.3d 1174 (2003); RCW 26.09.160(4).

As ordered, Ms. Adams appeared at the residential exchange location on Saturday at 5:00 p.m. She strictly complied with the Court's order. She did not refuse to perform the duties of the parenting plan. Her later hesitation to take her daughter to a stranger, while Mr. McMillin would not confirm if he was in the state, does not rise to refusal to comply with the parenting plan, and is certainly not bad faith.

This is not an effort to condition one portion of the parenting plan with another. Ms. Adams never conditioned her performance on the conduct of Mr. McMillin except to ask <u>when</u> he could pick up the child. Ms. Adams was court ordered to return the child to the other parent. She

did not know Beth Barker; she did not know if Mr. McMillin was in the state. Ms. Adams asked Mr. McMillin repeatedly if he would return to Washington from Las Vegas and be available for the residential transfer. He never once answered the question. Ms. Adams was ensuring the safety of her child, not conditioning the parenting plan provisions. Her resistance to meet a stranger to drop off her daughter was not an improper conditioning of parenting plan provisions, but rather legitimate concern for the safety of the child.

The trial court found that Ms. Adams had the ability to comply with the order by returning the child to Beth Barker on Sunday, December 8, 2013. This was not the order of the Court made just two-days prior. Ms. Adams was to return the child to Mr. McMillin on Saturday at 5:00 p.m. – which she attempted to do. She did not act with intentional misconduct or in bad faith by failing to deliver the child to Ms. Barker on Sunday. The Order found to have been violated contains no such directive.

For these reasons, the trial court erred when it concluded that Ms. Adams violated the Court's December 6, 2013 Order by not returning Lia to Ms. Barker on December 8, 2013.

C. Mr. McMillin's Failure to Appear at the Residential Exchange Made it Impossible to Fully Comply with the Residential Schedule.

Ms. Adams undisputedly appeared for the residential transfer at 5:00 p.m. on Saturday December 7, 2013 as ordered. Ms. Adams is not arguing that her compliance was conditioned on Mr. McMillin's compliance, but rather that Mr. McMillin's failure to appear, or inform Ms. Adams that he had designated someone else to pick up the child made it impossible for her to comply with the Order. Moreover, his designee was not at the transfer location at 5:00 p.m.

Mr. McMillin cites RCW 26.09.160 for the proposition that Ms. Adams is attempting to condition her performance on Mr. McMillin's compliance. This is not a situation where mother refused to bring the child back because father failed to pay child support. Ms. Adams did not object to returning the child; in fact, she was at the appointed location at the correct time. Later, she wanted to know that the child would be going with Mr. McMillin, not a stranger. Mr. McMillin's failure to appear at the residential exchange at the time required by the court, failure to inform Ms. Adams or the trial court on December 6, 2013 when the Order was entered that he was out of state the next day, and failure to communicate

when he would return from Las Vegas made it impossible for her to strictly comply with the Court's order.

The entire residential exchange began with deception when Mr. McMillin, through counsel in court on Friday morning, failed to inform either the trial court or Ms. Adams that he had longstanding plans to attend a convention in Las Vegas and would not even be in the state. He did not inform Ms. Adams that the child would be staying with a third party (someone Ms. Adams did not know), much less when he would return from Las Vegas. Whether the exchange time was communicated incorrectly by Mr. McMillin or his attorney is irrelevant. No person was there to receive the child at the court ordered time. Ms. Adams, despite her efforts, could not comply with the court's order. Arguably, Mr. McMillin's deception, and refusal to answer her pointed questions about the day and time of his return constituted hindrance of her ability to comply with the order. *See* RCW 26.09.160(1). Ms. Adams was not trying to negotiate or condition her performance, but rather asked for an answer to a straight forward question, "when will you be in Washington to receive and care for the child?"—a question Mr. McMillin completely avoided answering.

D. Mr. McMillin is Not Entitled to Attorney's Fees.

Mr. McMillin has requested attorney's fees on the basis of a frivolous appeal. An appeal is frivolous if, considering the entire record, the Court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal. *Lutz Tile, Inc. v. Krech*, 137 Wn. App. 899, 151 P.3d 219 (2007). The appeal here is not frivolous however, because Ms. Adams complied with the strict construction of the December 6, 2013 Order. Ms. Adams appeared for the residential transfer at the time and place required by the Order. She did not act in a manner of intentional misconduct, or bad faith. As such, the finding of contempt, and the Order of Contempt entered by the Court were not proper.

Ms. Adams has produced authority to support her position on appeal: the trial court did not make the proper findings for contempt, and even so, those findings were in error because Ms. Adams did strictly comply with the Order, and the father's failure to appear for the transfer made further compliance impossible. Ms. Adams' conduct did not constitute bad faith. It is undisputed that Ms. Adams appeared at the location of the residential exchange at the time designated in the December 6, 2013 Order. These are not frivolous arguments, and

attorney's fees should not be awarded pursuant to RCW 4.84.185 as Respondent requests.

Moreover, for the reasons set forth herein, the finding of contempt and the trial court's order of contempt were in error. Mr. McMillin should not have been awarded attorney's fees at the trial court, and those fees should be reversed. Similarly, this Court is respectfully requested to reverse the trial court's order of contempt and award of fees, thus making Ms. Adams the prevailing party on appeal, and deny Mr. McMillin's request for attorneys' fees on appeal. RAP 18.1

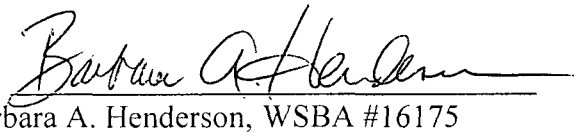
II. CONCLUSION

Ms. Adams did strictly comply with the trial court's December 6, 2013 Order. She was present at the residential exchange location at the time she was required to appear. Her later denial to drop off the child with a stranger designated by Mr. McMillin to conduct the exchange was not failure to comply with the Court's order, and not intentional misconduct or bad faith. As such, the trial court erred by entering the January 15, 2014

Order of Contempt, and this Court is respectfully requested to reverse that Order.

Respectfully submitted this 17th day of November, 2014.

SMITH ALLING, P.S.

By: 

Barbara A. Henderson, WSBA #16175
Morgan K. Edrington, WSBA #46388
Of Attorneys for Appellant April Adams

CERTIFICATE OF SERVICE

I hereby certify that I have this 17th day of November, 2014, served a true and correct copy of the foregoing document, via the methods noted below, properly addressed as follows:

Counsel for Respondent:

Mr. Jeffrey A. Robinson	____ Hand Delivery
Attorney at Law	____ U.S. Mail
4700 Pt. Fosdick Dr. N.W., Ste. 301	____ Legal Messengers
Gig Harbor, WA 98335	____ Facsimile
jeff@jrobinsonlaw.com	__X__ Email
	____

Washington State Court of Appeals	__X__ Hand Delivery
Division Two	____ U.S. Mail
950 Broadway, Suite 300	
Tacoma, WA 98402-4454	
coa2filings@courts.wa.gov	____ Email

I declare under penalty of perjury under the laws of the State of Washington that the I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 17th day of November, 2014, at Tacoma, Washington.

Lisa Schrader, Legal Assistant